United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1500

76-1474

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-1500

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

v.

VINCENT FERRIGNO, ET AL.

DEFENDANTS-APPELLANTS

APPELLANTS' CONSOLIDATED APPEAL FROM
JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT VINCENT FERRIGNO

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STATEMENT OF THE CASE

The defendant Vincent Ferrigno pleaded nolo contendere to a one count Information alleging a violation of United States Code Title 26, Section 7262 (26 U.S.C. §7262), for failure to pay to the District Director of Internal Revenue Hartford, Connecticut the special occupational tax imposed by United States Code, Title 26, Section 4411 (26 U.S.C. §4411) upon those persons in the business of receiving and accepting wages, as defined in Sections 4421(1) and (2) of Title 26, United States Code. Upon this plea the district court entered a Judgment of guilty and imposed a fine of One Thousand Dollars ($1,000.00), from which this appeal is taken. Execution of the payment of the fine has been stayed pending the appeal.

Prior to his plea, the defendant, joined by his five co-defendants, moved to dismiss the Information on grounds that the statutory framework of Chapter 35 of the Internal Revenue Code concerning the payment of a special occupational tax (herein a "wagering tax"), compels disclosure of incriminating information in violation of the fifth amendment privilege against self-incrimination. The motion challenged the constitutionality of Chapter 35 on its face and as applied.

No evidentiory hearing was held on the as-applied challenge, and appellant Ferrigno appeals only from the denial of his motion to dismiss by the lower court, rejecting the facial constitutional challenge by written Memorandum. (Appellant's Appendix at 4-11).

STATUTES CITED

UNITED STATES CODE

26 U.S.C. §4401 IMPOSITION OF TAX.

* * * * (a) Wagers. - There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 2 percent of the amount thereof.

(b) Amount of Wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable For Tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of

such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. * * * *

26 U.S.C. §4402 EXEMPTIONS.

* * * * No tax shall be imposed by this subchapter -

(1) Parimutuels. - On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) Coin-Operated Devices. - On any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2), if an occupational tax is imposed with respect to such device by section 4461, or

(3) State-Conducted Sweepstakes. - On any wager placed in a sweepstakes, wagering pool, or lottery -

(A) which is conducted by an agency of a State acting under authority of State law, and

(B) the utlimate winners in which are determined by the results of a horse race,

but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents. * * * *

26 U.S.C. §4403 RECORD REQUIREMENTS.

* * * * Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a). * * * *

26 U.S.C. §4411 IMPOSITION OF TAX.

* * * * There shall be imposed a special tax of $500 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. * * * *

26 U.S.C. §4412 REGISTRATION.

* * * * (a) Requirement. - Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district -

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or Company. - Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental Information. - In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. * * * *

26 U.S.C. §4413 CERTAIN PROVISIONS MADE APPLICABLE.

* * * * Sections 4901, 4902, 4904, 4905, and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provision of sections 4901 to 4907, inclusive, shall so extend or apply. * * * *

26 U.S.C. §4421 DEFINITIONS.

* * * * For purposes of this chapter -

(1) Wager. - The term "wager" means -

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery. - The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include -

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual. * * * *

26 U.S.C. §4422 APPLICABILITY OF FEDERAL AND STATE LAWS.

* * * * The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes. * * * *

26 U.S.C. §4423 INSPECTION OF BOOKS.

* * * * Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. * * * *

26 U.S.C. §4424 DISCLOSURE OF WAGERING TAX INFORMATION.

* * * * (a) General rule. - Except as otherwise provided in this section, neither the Secretary or his delegate nor any other officer or employee of the Treasury Department may divulge or make known in any manner whatever to any person -

(1) any original, copy, or abstract of any return, payment, or registration made pursuant to this chapter,

(2) any record required for making any such return, payment, or registration, which the Secretary or his delegate is permitted by the taxpayer to examine or which is produced pursuant to section 7602, or

(3) any information come at by the exploitation of any such return, payment, registration, or record.

(b) Premissible disclosure. - A disclosure otherwise prohibited by subsection (a) may be made in connection with the administration or civil or criminal enforcement of any tax imposed by this title. However, any document or information so disclosed may not be -

(1) divulged or made known in any manner whatever by any officer or employee of the United States to any person except in connection with the administration or civil or criminal enforcement of this title, nor

(2) used, directly or indirectly, in any criminal prosecution for any offense occurring before the date of enactment of this section.

(c) Use of documents possessed by taxpayer. - Except in connection with the administration or civil or criminal enforcement of any tax imposed by this title -

(1) any stamp denoting payment of the special tax under this chapter,

(2) any original, copy, or abstract possessed by a taxpayer of any return, payment, or registration made by such taxpayer pursuant to this chapter, and

(3) any information come at by the exploitation of any such document,

shall not be used against such taxpayer in any criminal proceeding.

(d) Inspection by Committees of Congress. - Section 6103(d) shall apply with respect to any return, payment, or registration made pursuant to this chapter. * * * *

26 U.S.C. §6103 PUBLICITY OF RETURNS AND LISTS OF TAXPAYERS.

* * * * (d) Inspection by committees of Congress. -

(1) Committees on Wayes and Means and Finance. -

(A) The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with

any data of any character contained in or shown by any return.

(B) Any such committee shall have the right, acting directly as a committee, or by or through such examiners or agents as it may designate or appoint, to inspect any or all of the returns at such times and in such manner as it may determine

(C) Any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Seante and the House, as the case may be.

(2) Joint Committee on Internal Revenue Taxation. - The Joint Committee on Internal Revenue Taxation shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House of Representatives, the Committee on Ways and Means or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be. * * * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Constitution requires a grant of use-derivative use immunity to a wagering taxpayer who provides information by compulsion of prosecution for failure to comply with the tax statute.

II. If use-derivative use immunity is not required, whether the current disclosure scheme of the wagering tax statutes nonetheless subjects the taxpayer to unconstitution burdens upon his fifth amendment privilege against self-incrimination, requiring the conviction based upon the statute to be set aside.

STATEMENT OF FACTS

Since the defendants below appeal only the rejection of their facial constitutional challenge, no determinative facts are associated with their particular cases. To the extent that a factual background is appropriate, it has been incorporated into section II of the following Argument as an explanation of the statutory scheme of the wagering tax laws.

ARGUMENT

I. INTRODUCTION

The issue before the court can be simply framed: Does payment of the wagering tax required by section 4411 subject an individual to greater risks of subsequent criminal prosecution than he would run if he asserted the privilege against self-incrimination and failed to comply with the requirements of the wagering tax statutes? If so, then the taxing and registration provisions of the statute are unconstitional, and failure to comply cannot serve as the basis for a criminal penalty. See United States v. Freed, 401 U.S. 601, 606 (1971); Murphy v. Waterfront Comm., 378 U.S. 52, 79 (1964). In Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968), the Supreme Court set aside convictions for failure to comply with the wagering tax statutes as then written, and, in doing so, suggested a minimum constitutional standard for protection of the fifth amendment privilege from further infringement by prosecutions for failure to comply. In Marchetti, the Court discussed "the imposition of restrictions upon the use by federal and state authorities of the information obtained as a consequence of compliance with the wagering

tax requirements." 390 U.S. at 58. The Court declined to superimpose such a restriction upon the wagering tax statutes for purposes of the case before it, because it perceived that the availability to federal and state prosecutors of the information obtained by way to the wagering tax enforcement scheme was part of the congressional purpose behind the requirements of registration and recordkeeping. However, the implications of the Court's reasoning are clear. Congress was left to weigh the "competing demands of the federal treasury and of state gambling prohibitions." Id. at 60. The appellant Ferrigno submits that in attempting to strike the balance Congress once again has failed to uphold the mandate of the fifth amendment. Rather, Congress has hedged once more by placing only limited restrictions on disclosure of the information provided to the Internal Revenue Service, thereby paying mock homage to the rulings in Marchetti, Grosso, and later comparable cases, and by refusing to place use and derivative use restrictions on information obtained pursuant to the federal Government's tax collecting powers. Despite the newly enacted rules governing availability and disclosure, the wagering taxpayer continues to be subject to a real risk that the information will be used in a later prosecution of him for state or federal criminal

violations. To argue that the new statutory framework obviates all substantial risks of incrimination and provides protections coextensive with the privilege itself simply is contrary to logic.

II. THE STATUTORY SCHEME

In 1968, the Supreme Court held that the wagering tax statutes, as then written, violated the fifth amendment privilege against self-incrimination because the information required to be submitted by a taxpayer in compliance with the statutes was inherently incriminatory, and its submission subjected a taxpayer to substantial risks that the information would be used against him in a subsequent criminal prosecution. Therefore, the wagering tax statutes "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements" with an assertion at trial of the privilege against self-incrimination. Marchetti v. United States, 390 U.S. 39, 42, 51 (1968) (overturned conviction of failure to pay occupational tax, §4411, and of failure to register with the I.R.S., §4412); Grosso v. United States, 390 U.S. 62 (1968) (overturned conviction of failure to pay the excise tax, §4401).

Some amendments to the wagering tax statutes have been passed since Marchetti and Grosso. An analysis of the changes and additions demonstrates the continuing

deficiency of the statutes' protections against self-incrimination.

Section 4401 of the Internal Revenue Code imposes on those engaged in the business of accepting wagers a two percent excise tax on the gross amount of all wagers they accept. Liability for the tax is limited by §4421 (which defines "wagers") and by §4402 (which exempts certain wagering activities) to those who are engaged in wagering activities which are made illegal by a wide variety of state and federal laws.[1]

Each person liable for §4401 tax must file a monthly return (Form 730) with his tax payment. Treas. Reg. §§44.6011(a)-1(a). Payment of the excise tax is not accepted by the I.R.S. unless it is accompanied by the return. See Grosso v. United States, 390 U.S. 62, 65 (1968). In addition, the taxpayer must keep daily records showing the gross amount of all wagers he has received. §4403; Treas. Reg. §§44.4403-1; 44.6001-1.

Section 4411 of the Internal Revenue Code imposes an annual occupational tax of $500 on those who are

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[1] See Marchetti v. United States, 390 U.S. 39, 44 (1968) for a comprehensive list of federal and state anti-gambling statutes. The Connecticut statutes at page 44 have since been amended, but gambling is still extensively punished. See C.G.S. §§53-278a to 53-278g.

liable for the excise tax under §4401 and on those who accept wagers on behalf of someone liable for the excise tax. Because those engaged in legalized gambling are exempted from the excise tax by §§4402 and 4421, the §4411 occupational tax applies primarily to persons accepting illegal wagers.

In order to pay the tax, a taxpayer first must register with the I.R.S. in accordance with §4412 and file Form 11-C. 26 U.S.C. §4413; Treas. Reg. §§44.4901-1(a); 44.6011(a)-1(b). Payment of the tax must be evidenced by a special tax stamp which is issued to the taxpayer upon receipt by the district director of a return on Form 11-C, together with remittance of the tax. The district director is prohibited from issuing a receipt instead of the special tax stamp. On Form 11-C, the taxpayer must state his true name and any alias, his home and business addresses, and whether or not he is or will be receiving wagers on his own account or on behalf of someone else.

As the Court noted in Marchetti, the I.R.S. will not accept payment of the tax unless it is submitted along with the registration form. "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure." 390 U.S. at 42 - 43.

Since the wagering taxes are imposed primarily on those engaged in accepting illegal wagers, filing the returns required to be submitted with payment of the taxes amounts to a compelled confession of involvement in activities which are criminally punishable under federal and state laws. See Marchetti v. United States, 390 U.S. 39, 48 - 49 (1968). Moreover, payment of these taxes grants no immunity from further prosecution for illegal gambling: "The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity." 26 U.S.C. §4422.

The provisions described above are essentially the same as they were when the Supreme Court held their enforcement to be unconstitutional. The only changes in the tax payment and registration requirements of Chapter 35 that have been enacted since Marchetti and Grosso have been in the amount of the taxes imposed. (The excise tax has been decreased from 10% to 2%; the occupational tax has been increased from $50 to $500.) However, the statutory obligations to publicize payments of wagering taxes, in effect at the time of Marchetti and Grosso, were removed later in 1968 (§6107, requiring disclosure of information by the I.R.S., was repealed;

§6806(c), requiring that a taxpayer post his tax stamp, was amended to exclude wagering tax stamps).

In 1974, Congress made a further change in the wagering tax statutes by the enactment of 26 U.S.C. §4424, which imposes a limited restriction on members of the Treasury Department against disclosing wagering tax returns, payments, registrations and records, or information derived from them. 26 U.S.C. §4424(a). These documents or information derived from them may be disclosed in connection with the "administration of civil or criminal enforcement" of the tax code. 26 U.S.C. §4424(b)(1). Furthermore, officials of the Treasury Department are required to furnish, upon request, wagering tax returns, payments, and registrations to certain congressional committees sitting in executive session (the House Ways and Means Committee; the Senate Finance Committee; the Joint Committee on Internal Revenue Taxation; and any specially authorized select committee). These committees may submit information obtained from the documents furnished them to the Senate or the House. 26 U.S.C. §§4424(d); 6103(d).

There is no general prohibition against use in a criminal proceeding of information furnished to the I.R.S. by a taxpayer in compliance with the wagering tax statutes. Documents or information disclosed by

the Treasury Department in connection with the administration or enforcement of the tax code may be used in a criminal prosecution for offenses occurring after December 1, 1974 (the date of the enactment of §4424), although they may not be used in criminal prosecutions for offenses occurring before that date. 26 U.S.C. §4424(b)(2). Nor is there a prohibition against use in a criminal proceeding of information disclosed to Congress. Section 4424(c) prohibits the use or derivative use against a taxpayer of tax stamps, registrations and returns which are found in his possession. However, §4424(c) does not prohibit the use against the taxpayer of the daily records which he is required by §4403 to maintain.

The system which Congress has adopted to tax those engaged in wagering is substantially unchanged since Marchetti. The forms required to be filled out and returned with the payment of the tax remain; a taxpayer still must acquire a special tax stamp and keep daily records of his gross receipts. Because the taxes applied primarily, if not exclusively, to those engaged in illegal gambling, the tax stamp, return and registration are all incriminatory, and would be if only name and address were required with the payment of the tax.

III. THE FEDERAL WAGERING TAX STATUTES VIOLATE DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT, IN THAT THEY DO NOT GRANT IMMUNITY FROM DIRECT OR DERIVATIVE USE IN CRIMINAL PROSECUTIONS OF INFORMATION SUPPLIED IN COMPLIANCE WITH THE STATUTES.

Although Congress concedely is entitled to tax illegal activities and require of the taxpayer information necessary to enforce such a tax (Marchetti v. United States, 390 U.S. 39, 44 (1968); Haynes v. United States, 390 U.S. 85, 97 (1968)), it must be kept in mind that in enacting the wagering tax statutes Congress has selected out for registration requirements those "inherently suspect of criminal activities." Because responding to the requirements of the statutes involves such a high risk of subsequent prosecution, an individual who validly claims the constitutional privilege against self-incrimination by failing to file wagering tax returns may not be subject to a criminal conviction for failure to file. Marchetti v. United States, supra, at 48 - 49. Assertion of the privilege is invalid only if the dangers of responding are removed in some fashion which affords the wagering taxpayer the same degree of protection as the privilege itself. See Kastigar v. United States, 406 U.S. 441, 453 (1972).

While a guarantee of transactional immunity is not necessary to remove the constitutional defect of the wagering tax statutes,[2] the Supreme Court held in Kastigar that only "immunity from use and derivative use is coexistensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege," because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in any respect and therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witnesses." 406 U.S. at 453 (emphasis original); Mackey v. United States, 401 U.S. 667, 703 - 704 (1971) (Brennan, J., concurring); Reina v. United States, 364 U.S. 507 (1970); Adams v. Maryland, 347 U.S. 179 (1954); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892). Accordingly, in Marchetti v. United States, when analyzing the problem in the context of wagering tax disclosure requirements,

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[2]The defendants in Kastigar had been granted use-derivative use immunity, but argued that the Constitution required full transactional immunity. The Supreme Court rejected this approach, noting that in a prosecution of a defendant who previously had been granted use-derivative use immunity by statute, the government would have the burden of showing that the evidence against the defendant was not tainted by establishing an independent, legitimate source for such evidence. 406 U.S. at 460; see Murphy v. Waterfront Comm., 378 U.S. 52, 79 n. 18 (1964).

the Court propounded the necessity of "restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the wagering tax provisions." 390 U.S. at 58. The Court declined to impose such restrictions only because this kind of alteration of the statutory framework was the province of Congress. Id.

In Kastigar, the Supreme Court ruled that a witness could not validly assert the fifth amendment privilege when promised that his testimony and any information derived from it would not be used in a criminal prosecution against him. Once the witness was assured of this immunity, he no longer could claim an exemption from the government's power to compel testimony in enforcing the criminal laws. The Court undertook an extensive discussion of the historical origins of this governmental power to compel testimony and characterized it as "firmly established in Anglo-American jurisprudence." 406 U.S. at 443. The Appellant submits that the power of the Government to collect taxes can be no greater than the Government's power to compel testimony in criminal prosecution. Kastigar held that, when confronted by a fifth amendment challenge, the testimonial power could prevail only when the Government provided use and derivative use immunity. No greater opportunity to

compel responses should be available to the Government in its efforts to obtain information necessary to the collection of taxes.

Congress nonetheless has conferred a power beyond constitutional bounds. In attempting to find limitations on this power to salvage the statutory scheme, at footnote six of its memorandum denying the motion of Appellant and his co-defendants to dismiss (Appendix at 11 - 12), the district court suggests a procedure for vindication of fifth amendment rights under the statute. The court notes that once an individual has complied with the registration requirements he "should be able to claim his fifth amendment privilege against this 'compelled' information should it prove relevant to any subsequent criminal trial for illegal gambling." (Appendix at 12). The district court cites as authority for its position footnote 14 of Garner v. United States, ____ U.S. ____, 47 L.Ed. 2d 370 (1976), which states:

> "Marchetti and Grosso, of course removed the threat of a criminal conviction when one validly claims the privilege by failing to file the gambling tax returns. We do not pause here to consider whether there may be circumstances that would deprive a gambler of the free choice to claim the privilege by failing to file such returns, and therefore allow him to exclude a completed gambling tax return by claiming the privilege at trial."

47 L.Ed. 2d at 381 n. 14 (emphasis in district court opinion). The lower court misreads the import of this quoted passage.

The hypothetical tenor of the Supreme Court's language makes clear that it was not granting implicit approval to the current wagering tax structure. Rather, the Supreme Court footnote does indicate that a defendant may file a gambling tax return, requiring him to disclose incriminating information, and later move to suppress that return, or part of it, at trial, which the Court held in Garner a normal income taxpayer could not do. This in no way suggests that the opportunity to attack evidence at a later trial provides the taxpayer sufficient protection of his fifth amendment rights when compliance with the wagering tax statutes requires him to incriminate himself. In fact, Marchetti holds to the contrary. 390 U.S. at 53; see Maness v. Meyers, 419 U.S. 449 (1975) (Court rejected Government's argument that a motion to suppress evidence in later prosecution would fulfill fifth amendment requirements against compulsory self-incrimination). Thus, the district court's reasoning begs the question, because the court failed to recognize that when a taxpayer's claim of privilege is "valid" at the point of compulsion, the Constitution permits him to withhold information regardless of the requirements of a statute. The proper inquiry should not be whether a procedure is available to resurrect a taxpayer's rights once violated; rather, the court should ask how the violation could be prevented in the first instance.

The current approach of the wagering tax statutes as interpreted by the district court fails to cure the fundamental defect in the statute because, if the information is incriminating at the time the individual is required to provide it - and Marchetti, at 48 - 49, has held that it must be so classified in the case of a wagering taxpayer - to compel the disclosure of information with the threat of criminal sanctions for non-compliance itself constitutes the constitutional violation, unless the government substitutes a protection co-extensive with the privilege.[3] Once the wagering taxpayer has provided the information under compulsion and the information can be used against him, the Constitution is no longer a shield against a subsequent conviction to which the information has contributed, either directly, indirectly, or remotely because the Constitution, or more accurately, a court seeking to so uphold it cannot police effectively the utility of the information to the prosecution's

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[3]Compare Garner v. United States, ____ U.S. ___, 47 L.Ed. 2d 370 (1976). In Garner, the Court found that, in the case of an income taxpayer, the compulsion to file a return is not a constitutional violation because the act of filing is not inherently incriminatory, the Court distinguished Marchetti and Grosso on that ground. Id. at ____, 47 L.Ed. 2d at 380 - 381.

case. Absent a prohibition on use and derivative use, the constitutional damage is done at the moment of compliance and incrimination under compulsion. Unlike Kastigar, supra note 2, where the Court found that imposing upon the prosecutor the burden of proving an independent basis for the disputed evidence indeed was a sufficient protection to sustain the Government's power to compel testimony following a grant of use-derivative use immunity, in the instant case there can be no such saving provision because the intent of Congress apparent upon the face of section 4424 is that there is not to be any prohibition against post-1974 use if the section is complied with. What remains is only the requirement that the prosecutor need prove that he did not obtain his evidence in violation of §4424. If he satisfies this burden, which would not be difficult given the looseness of the disclosure restrictions, he may use the disputed evidence, and the defendant then falls by his own sword.

The foregoing anaylsis follows directly from the mandate of Supreme Court decisions defining the scope of the privilege, and provides an incomplete basis for declaring the wagering tax statutes unconstitutional only if this court adopts as a talisman the language in Marchetti finding "real and appreciable"

hazards of subsequent criminal prosecution upon the facts of that case. See 390 U.S. at 48. The Court in Marchetti was faced with a more egregious constitutional violation than is presented here, and found as a matter of fact and without imposing a minimum constitutional standard, that real and appreciable risks of self-incrimination are violative of the fifth amendment privilege. The "real and appreciable" test could be viewed on one end of the spectrum of burdens upon constitutional rights, with the "imaginary and insubstantial" test on the opposite, permissible side. Only if the Government affords the equivalent of the Kastigar protection - i.e. use-derivative use immunity with the burden upon the government of proving no taint - do the hazards truly become trifling and imaginary to an actual wagering taxpayer who provides the I.R.S. with all the evidence needed to obtain a conviction for a variety of crimes. While, under the facts of the case at hand, the risks, although still substantial, are less than in Marchetti, they should be deemed, as a matter of law, an impermissible infringement upon the exercise of fifth amendment rights.

The deficiencies of the existing protections of the privilege are brought into sharp relief by

comparable constitutional challenges on fifth amendment grounds in prosecutions for failure to comply with federal firearm registration laws. In 1968, in a case handed down on the same day as Marchetti, the Supreme Court upset a conviction for possession of unregistered firearms under the National Firearms Act, which required a transferee of certain weapons to register with the I.R.S. Haynes v. United States, 390 U.S. 85 (1968). All the weapons for which registration was required were illegal under various state and federal laws. The Court held that compulsory registration violated the privilege against self-incrimination.

Three years later, in United States v. Freed, 401 U.S. 601 (1971), the Court upheld enforcement of the amended firearms registration law. The revised law required registration of all firearms, legal as well as illegal, by the manufacturer or importer, not the buyer. In addition:

> "The revised statute explicitly states that no information or evidence provided in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant 'in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.' The scope of the privilege extends, of course, to the hazards of prosecution under the state law

for the same or similar offenses." 401 U.S. at 604.

The Court pointed out that as a matter of administrative practice, "no information filed is . . . disclosed to any law enforcement authority." 401 U.S. at 604. (emphasis original). The practice of non-disclosure was not in itself sufficient to overcome the fifth amendment privilege. The Court held that this practice, "combined with the protection against use to prove prior or concurrent offenses, satisfies the fifth amendment requirements respecting self-incrimination." 401 U.S. at 606. (emphasis added).[4]

Thus, despite limited restrictions in section 4424 against the disclosure by Internal Revenue Service officials of the information provided in the returns and registration forms, the statutory scheme is deficient in two respects. First, prohibitions on disclosure are far from absolute or certain, as discussed more fully below; and, more importantly for purposes of this discussion, there are no statutory restrictions on the use of the information

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[4]It should be noted that use immunity limited to prior or concurrent offenses would not provide a person who complied with the wagering occupational tax with sufficient protection against self-incrimination. In Marchetti, the Court specifically held the privilege against self-incrimination applicable to future acts, 390 U.S. at 53 - 54. However, §4424 does not even afford the taxpayer concurrent use immunity.

in any respect.[5] Because compliance with the wagering tax laws continues to involve the supplying of inherently incriminatory information to Government authorities, and since there is no statutory prohibition against a member of Congress's disclosing or law enforcement agent's using such a list, the wagering tax scheme remains in violation of the fifth amendment privilege against self-incrimination.

IV. THE FEDERAL WAGERING TAX STATUTES VIOLATE DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT IN THAT THEY FAIL TO PROVIDE SUBSTANTIAL PROTECTION AGAINST DISCLOSURE BY INTERNAL REVENUE OFFICIALS.

The district court improperly failed to address the constitutional necessity of a use-derivative use immunity in sustaining the wagering tax enforcement scheme as currently structured. Rather, the lower court focused on the likelihood of disclosure and use of the information in the hands of the government in subsequent criminal prosecutions of the wagering taxpayer. For the reasons set forth above, this analysis is misplaced

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[5] See 26 U.S.C. §4422 (permits prosecution for gambling activity and expressly denies immunity).

in light of the constitutional requirements previously established by the Supreme Court. Nonetheless, in order to address fully the error of the court below, the appellant submits the following discussion of the disclosure restrictions of section 4424.

Section 4424 of the Internal Revenue Code fails to assure the confidentiality of information supplied to the I.R.S. in compliance with the wagering tax statutes. Its prohibition against disclosure is only partial: wagering tax documents and information derived from them may be disclosed in connection with the administration and enforcement of other provisions of the Internal Revenue Code, and the documents must be disclosed to certain congressional committees at their request. A person may not constitutionally be compelled to submit himself to these risks inherent in this system. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Albertson v. S.A.C.B., 382 U.S. 70 (1965).

Subsection (b) of §4424 authorizes the disclosure of wagering tax returns, payments, registrations, and records or information derived from these documents in connection with enforcement of the Code. Therefore, a member of the Justice Department may contact the I.R.S.

pursuant to an investigation of someone for income tax evasion and ask if the person had filed a wagering tax return or paid the special wagering tax. If the suspect has paid the tax, the I.R.S. is authorized to disclose this information, because it is sought in connection with tax enforcement (paying of a special wagering tax and supplying of information of gross wagering receipts without reporting income from wagering may raise a suspicion of income tax evasion).

Once the Justice Department receives the information, it is not prohibited by statute from using it in the course of an investigation of the same person for gambling offenses committed after December 1, 1974. Subsection (b)(1) of §4424 prohibits the information disclosed by the Treasury Department from being further disclosed by the recipient of that information, subject to the exceptions of §4424 (d). It does not prohibit the recipient from using that information. The protection guaranteed by the fifth amendment "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution," Maness v. Meyers, 419 U.S. 449, 461 (1975); see Marchetti

v. United States, 390 U.S. 39, 48 (1968).

The Treasury Department may, under §4424(b), disclose information supplied by wagering taxpayers to members of the Justice Department for use in the prosecution of other tax crimes. The Department has published no rules or regulations to assist members of the I.R.S. in distinguishing authentic from spurious requests for information. Even as to valid requests for information, there is no guarantee that such information will not be used to "furnish a link in the chain of evidence leading to prosecution." Unless a taxpayer is afforded such a guarantee, he may not constitutionally be compelled to furnish the incriminatory information.

Furthermore, no regulations have been published to insure compliance with the general ban on disclosure. (Compare §6103(a) and related regulations concerning disclosure of income tax returns). Nor is there a section of the Internal Revenue Code imposing sanctions on unauthorized disclosure. (Compare §7213 which punishes unauthorized disclosure of income tax returns.) The only sanction to be found is 18 U.S.C. §1905 which penalizes unauthorized disclosure of confidential information by officers and employees of the United States, generally. Research by counsel has uncovered no reported cases of I.R.S. agents punished under 18 U.S.C. §1905.

In addition to the risk that information supplied to the I.R.S. in compliance with the wagering tax laws will reach federal prosecuting authorities in the form of disclosures permissible under §4424(b), there exists a real and substantial risk that returns supplied by the Treasury Department to Congress under §§4424(d) and 6103(d) will be used against the taxpayer. Although §6103(d)(1)(A) provides that the returns be furnished to the authorized Congressional committees in executive session, §6103 (d)(1)(C) permits those committees to submit "any relevant or useful information thus obtained" to the House and/or the Senate. Furthermore, 2 U.S.C. §72a(d) provides that all committee hearings, records and data are the property of Congress and that all members of the committee and the respective Houses shall have access to them. While counsel have been unable to obtain copies of the published rules of the pertinent Congressional committees, it appears from the manuals of the House and the Senate that there is no prohibition against disclosure of information derived from the wagering tax returns.[6]

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[6]Senate Rule IV provides that legislative, executive, and confidential legislative proceedings each shall be recorded in a separate book. 2 U.S.C. §145 requires that two copies of each book printed in either the House or the Senate be deposited in the Library of Congress.
(continued on following page)

Since, as to offenses committed after December 1, 1974, there exists no statutory prohibition against use of information supplied to the I.R.S. in compliance with the wagering tax laws, it is not improbable that a member of Congress, who is authorized under §6103(d) to receive wagering tax information, could pass on to state and federal prosecuting authorities a list of the names and addresses of those who had paid the wagering occupational tax. There is no statutory prohibition against such disclosure.

The Treasury Department is authorized to disclose information concerning payment of wagering taxes both to federal tax enforcement authorities and to Congress. The federal tax enforcement authority is the same entity as the authority for federal law enforcement generally: the Justice Department. The risk that the Justice Department will use information acquired for the enforcement of one set of laws in the enforcement of another set of laws simply cannot be considered "trifling or imaginary". United States v. Freed, 401 U.S. 601, 606 (1971).

(6 cont.) Research by counsel has been unable to discover any rule prohibiting access to such books by the Justice Department or state law enforcement authorities. Senate Rules XXXV and XXXVI provide for closed door and executive sessions, and for the secrecy of confidential communications by the President. These rules do not by their language extend the rule of secrecy to communications from the Treasury Department. The House rule pertaining to secret sessions, Rule XXIX, contains no mention of sanctions.

The foregoing possibilities of disclosure of information provided by the wagering taxpayer cannot properly be characterized as "remote", as they were by the district court. (Appendix at 11). Regardless of whether such a characterization is supportable, the error of the district court derives more directly from misplaced emphasis on an analysis of actual probabilities of prosecution than upon the impact upon the rights of a wagering taxpayer of even the remote chance of use of the information in a subsequent criminal prosecution. In the area of fifth amendment protection, courts should not place themselves in the position of evaluating on a case by case basis the risk to individual defendants. Once the information is in the hands of a prosecutor - and it cannot be denied that a prosecutor, particularly those with close ties to the Treasury Department, can obtain the information within the restrictions of section 4424 - it is the prosecutor alone who evaluates how to use the information. Courts cannot step into his shoes to determine how or whether it will be used. More appropriately, following cases such as Freed, courts should focus upon whether the prosecutor is subject to sufficient restrictions that he may not turn the information against the taxpayer. If it fairly can be said that the person is "left in the same position as if he had not

given" the information (United States v. Freed, 401 U.S. 601, 606 (1971)), then he may not validly claim an infringement upon his fifth amendment privilege. The limited disclosure restrictions of the current statute alone do not provide this assurance to the taxpayer. He is left, with just and reasonable cause, to speculate on the ways the information can be obtained to be used against him by state or federal officials, and, having thrown himself in jeopardy of prosecution, he is left to rely only upon inadequate and uncertain means of protection (see pp 25 - 26, supra). This statutorily imposed process has placed an intolerable burden upon the Appellant's constitutional rights, and punishment for failure to file a return and pay the occupational tax must be set aside as a violation of the fifth amendment guarantee against self-incrimination.

V. CONCLUSION

The wagering tax statutes as currently written do not provide Appellant with immunity from use or derivative use of the information obtained thereunder. Thus, they fail to offer adequate protection of the right against self-incrimination. Further, since the wagering taxpayer faces such substantial risks of prosecution on the basis of the information supplied to the Internal

Revenue Service, and in no way is placed in the same position as if he had not registered and paid the occupational tax, the wagering tax statutes must be declared unconstitutional, and the conviction for failure to pay the tax imposed by the statutes must be set aside and the Judgment of the district court vacated.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-1500

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

v.

VINCENT FERRIGNO, ET AL.

DEFENDANTS-APPELLANTS

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Brief of Defendant-Appellant, was mailed, postage prepaid, to Paul E. Coffey, Esquire, Strike Force Attorney, Office of the U.S. Attorney, Federal Building, 450 Main Street, Hartford, Connecticut 06103, this 6TH day of December, 1976.

Thomas D. Clifford

Thomas D. Clifford